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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

FRANCISCO INOJOSA,

Defendant and Appellant.

B232789

(Los Angeles County
Super. Ct. No. PA066250)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Daniel B. Feldstern, Judge. Judgment modified and affirmed as modified.

Sarah A. Stockwell, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, James William Bilderback II and Kathy S. Pomerantz, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant Francisco Inojosa of assault with a firearm (Pen. Code, § 245 subd. (a)(2))¹ (count 1). The jury found that defendant personally used a handgun within the meaning of section 12022.5 and that the offense was committed for the benefit of a criminal street gang within the meaning of section 186.22, subdivision (b)(1)(C).

The trial court sentenced defendant to 24 years in state prison. The sentence consisted of the upper term of four years in count 1, plus 10 years pursuant to section 12022.5, and 10 years pursuant to section 186.22, subdivision (b)(1)(C).

Defendant appeals on the ground that the trial court erred when it imposed a 10-year consecutive sentence for both the personal gun-use enhancement and the gang enhancement.²

FACTS

We recite the evidence in the light most favorable to the judgment. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) On the night of July 24, 2009, defendant was among a group of people who walked up to three men sitting in a parked car on Nagle Street. One of the group outside the car said, “Grumpy Winos” and asked one of the car’s passengers, David Valdez, if he and the others were in a gang. Defendant pointed a gun at Valdez. Defendant said “Nagle” and hit Valdez in the face. The driver then pulled away.

A gang expert testified that the Grumpy Winos were a criminal street gang that claimed an alleyway near Nagle Street. The expert testified that he knew defendant to be a member of the Grumpy Winos.

¹ All further references to statutes are to the Penal Code unless stated otherwise.

² In his opening brief, defendant asserted without argument that he joined in any issues and arguments raised by his codefendant, Steven Liuzza. After filing an opening brief, Liuzza requested and received a dismissal of his appeal on January 17, 2012. Respondent noted in its brief that only one of Liuzza’s issues was applicable to defendant and addressed that issue. Since defendant subsequently did not discuss that issue in his reply brief, we consider it forfeited.

DISCUSSION

Defendant argues that imposition of both the gun-use enhancement under section 12022.5 and the gang enhancement under section 186.22, subdivision (b)(1)(C) has been specifically forbidden by the California Supreme Court, citing *People v. Rodriguez* (2009) 47 Cal.4th 501, 504 (*Rodriguez*). He contends that one of the enhancements must be stricken.

Respondent agrees that both enhancements should not have been imposed. According to respondent, rather than strike one of the enhancements, this court should exercise its power to modify the sentence on the gang enhancement.

After imposing the high term of four years for assault with a firearm (§ 245, subd. (a)(2)) in count 1, the trial court imposed the high term of 10 years for the gun-use enhancement (§ 12022.5, subds. (a), (d)) and 10 years for the gang enhancement under section 186.22, subdivision (b)(1)(C), since defendant's crime qualified as a violent felony as defined in section 667.5, subdivision (c). Section 667.5, subdivision (c)(8) lists as a violent felony, inter alia, "any felony in which the defendant uses a firearm which use has been charged and proved as provided in subdivision (a) of Section 12022.3, *or Section 12022.5 or 12022.55.*" (Italics added.) Thus, it was only because the jury found that defendant personally used a firearm within the meaning of section 12022.5 that his offense in count 1 qualified as a violent felony under section 667.5, subdivision (c)(8).

In *Rodriguez*, the court held that it was a violation of section 1170.1, subdivision (f) to impose an enhancement under section 12022.5, subdivision (a) for personal use of a firearm *and* under section 186.22, subdivision (b)(1)(C), when the defendant was eligible for the latter enhancement only because he used a firearm as provided in section 12022.5. (*Rodriguez, supra*, 47 Cal.4th at pp. 508-509.) Subdivision (f) of section 1170.1 provides that "[w]hen two or more enhancements may be imposed for being armed with or using a . . . firearm in the commission of a single offense, only the greatest of those

enhancements shall be imposed for that offense.” (See *Rodriguez*, at p. 508.) Under *Rodriguez*, therefore, the trial court could not impose both enhancements in this case.³

In *Rodriguez*, the Supreme Court instructed the Court of Appeal to reverse the judgment and remand the matter to the trial court for resentencing in a manner that did not violate the provisions of section 1170.1, subdivision (f). (*Rodriguez*, *supra*, 47 Cal.4th at p. 510.) Defendant urges this court to “simply strike one of the two enhancements.” According to defendant, remand for resentencing is not required, since the trial court chose the maximum sentence available in all of its sentencing choices, and no restructuring of sentencing choices is available to it. Respondent also argues that remand is not necessary, but that the jury’s true finding on the allegation under section 186.22, subdivision (b)(1)(C) necessarily encompassed a true finding on the elements of a gang allegation under section 186.22, subdivision (b)(1)(A). Therefore, respondent contends, the firearm-use enhancement may remain, and the high term of four years provided for in the standard gang enhancement under section 186.22 (b)(1)(A) may be imposed. We agree with respondent.

Defendant counters that, where section 186.22, subdivision (b)(1)(A) provides that an additional term of two, three, or four years, may be imposed “[e]xcept as provided in subparagraphs (B) and (C),” it means that this enhancement is expressly not permitted when the underlying felony is a serious or violent felony. We believe that the language relied upon by defendant, rather than prohibitive, merely signals that there are limited applications of the gang enhancement that carry more severe penalties.

³ Although defendant’s offense also qualifies as a serious felony under section 1192.7 because of his firearm use (§ 1192.7, subd. (c)(31)), *Rodriguez* clearly prohibits the imposition of the firearm-use enhancement and the gang enhancement applicable to serious felonies under section 186.22, subdivision (b)(1)(B). Under *Rodriguez*, imposition of both enhancements would also constitute a violation of section 1170.1, subdivision (f).

In defendant's scenario, a defendant who committed a violent felony by virtue of his use of a gun would potentially receive no punishment at all based on the gang nature of his crime, unless his gun-use enhancement were stricken. This result would not be in conformity with "the legislative intent to punish and deter criminal gang activity pursuant to section 186.22, subdivision (b)(1)." (*People v. Akins* (1997) 56 Cal.App.4th 331, 341.) Nor would it accomplish the Legislature's purpose of using the law "to the fullest extent possible . . . to deter criminal gang activity." (*Ibid.*) "When construing a statute, we must "ascertain the intent of the Legislature so as to effectuate the purpose of the law." [Citations.]" (*State Farm Mutual Automobile Ins. Co. v. Garamendi* (2004) 32 Cal.4th 1029, 1043.) In the end, "we 'must select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences. [Citation.]' [Citation.]" (*Wilcox v. Birtwhistle* (1999) 21 Cal.4th 973, 977-978.) Moreover, the clear intent of section 1170.1, subdivision (f) is to allow imposition of only one enhancement for *weapons* (*People v. Espinoza* (1983) 140 Cal.App.3d 564, 566 [interpreting analogous language in former § 1170.1, subd. (e)]), and modification of the gang enhancement does not defeat this intent.

In the instant case, defendant was notified that a sentence enhancement based on the gang enhancement statute would be sought, and he was notified of the facts supporting the enhancement. He therefore had the opportunity to fully defend against it. (See *People v. Dixon* (2007) 153 Cal.App.4th 985, 1001-1002 [defendant charged with enhancements for personal use of a firearm under § 12022.53, subd. (b) was not deprived of notice or due process when trial court concluded that only lesser enhancements for personal use of a deadly weapon were proved and imposed punishment accordingly]; *People v. Neal* (1984) 159 Cal.App.3d 69, 72-74 [even though information incorrectly cited code section for lesser enhancement, imposition of greater enhancement not prejudicial when defendant placed on notice of the facts supporting the sentence enhancement actually sought].) Accordingly, the lesser enhancement under section

186.22, subdivision (b)(1)(A) may be imposed even though the information did not charge this specific allegation. (See *People v. Lucas* (1997) 55 Cal.App.4th 721, 742-743 [trial court properly imposed lesser enhancement of “simple arming” when there was insufficient evidence to support enhancement for defendants’ firearm use, which the jury had found true]; *People v. Allen* (1985) 165 Cal.App.3d 616, 627 [personal gun use findings reduced to lesser included violations of § 12022, subd. (a), applicable when a principal is armed]; *People v. Strickland* (1974) 11 Cal.3d 946, 959-961 [when defendant’s crime was not one of enumerated offenses to which firearm-use enhancement statute applied, judgment was modified to impose arming enhancement].) The true finding by a properly instructed jury on the gang allegation under section 186.22, subdivision (b)(1)(C) necessarily encompassed a true finding on the elements of the allegation under section 186.22, subdivision (b)(1)(A), because the jury necessarily found that the assault was committed for the benefit of a criminal street gang.⁴ Therefore, imposition of the gang enhancement need not be vacated entirely.

Accordingly, we exercise our discretion to modify defendant’s sentence to impose the high term for the lesser gang enhancement under section 186.22, subdivision (b)(1)(A) in lieu of the enhancement under section 186.22, subdivision (b)(1)(C). By imposing the high term, we are comporting with the trial court’s clear intent to impose the maximum sentence possible. (See §§ 1181, subd. 6 [“[w]hen the verdict or finding is contrary to law or evidence, but if the evidence shows the defendant to be not guilty of the degree of the crime of which he was convicted, but guilty of a lesser degree thereof, or of a lesser crime included therein, the court may modify the verdict, finding or judgment accordingly without granting or ordering a new trial, and this power shall extend to any court to which the cause may be appealed”]; 1260 [authorizing appellate

⁴ A lesser offense is necessarily included in a greater offense if the statutory elements of the greater offense include all the elements of the lesser offense, so that the greater cannot be committed without also committing the lesser. (*People v. Montoya* (2004) 33 Cal.4th 1031, 1034.)

court to modify judgment to reduce the degree of the offense or attempted offense].) As a result, defendant's sentence must be reduced by six years instead of by 10 years.

DISPOSITION

The judgment is modified to vacate the enhancement imposed under Penal Code section 186.22, subdivision (b)(1)(C) and to impose an enhancement under section 186.22, subdivision (b)(1)(A) in count 1 and to reduce defendant's sentence to 18 years instead of 24 years. In all other respects, the judgment is affirmed. The superior court is directed to prepare an amended abstract of judgment and to forward a copy to the Department of Corrections and Rehabilitation.

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_____, P. J.
BOREN

We concur:

_____, J.
ASHMANN-GERST

_____, J.
CHAVEZ